

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1231

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Plaintiff-Appellant,

-against-

J. E. LaVALLE, Superintendent of
Clinton Correctional Facility, Dannemora,
N. Y.,

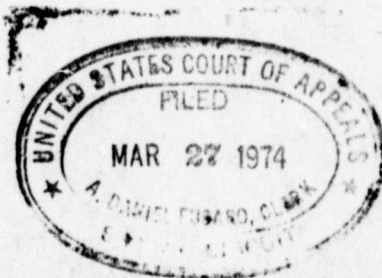
Defendant-Appellee.

DOCKET NO.
74-1231

B
B in brief

APPENDIX FOR APPELLANT

ON APPEAL FROM A MEMORANDUM-DECISION
AND ORDER
OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF NEW YORK



MICHAEL DAVIDOFF, ESQ.
Attorney for the Appellant
Ten Hamilton Avenue.
P.O. Box 809
Monticello, New York 12701

TABLE OF CONTENTS

Docket Entry	A-B
Petition for Writ Of Habeas Corpus with annexed Exhibits	1-79
Memorandum - Decision and Order of the Hon. James T. Foley, U. S. District Judge	80-84

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

U.S. Form No. 103 Rev.

TITLE OF CASE

ATTORNEYS

UNITED STATES OF AMERICA, ex rel
GEORGE FOYE,
Relator/Petitioner
-against-

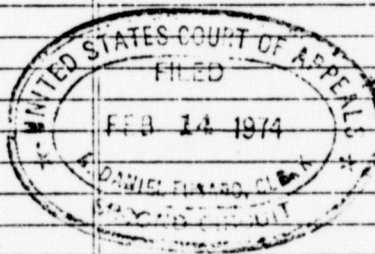
J. E. LaVALLEE, Superintendent of
Clinton Correctional Facility, Dannemora,
New York,

Respondent

For plaintiff:

Cooke, McBride, Davis & Greedler
10 Hamilton Avenue, P.O. Box 189
Monticello, New York 12701
(E. Stewart Jones
28 Second Street
Troy, New York 12181)

For defendant:



Handwritten notes and signatures, including a large 'V' and '1021-74'.

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	
J.S. 5 mailed	Clerk	1973 Dec. 10	Cooke, McBride, etc.	5 00	
J.S. 6 mailed	Marshal	1974 Jan. 18	Dep. Cr. Tr. U.S. Cooke, McBride, etc.	5 00	5 00
Basis of Action:	Docket fee	" 25	Dep. Cr. Tr. U.S.	5 00	5 00
Petition for Writ of Habeas Corpus	Witness fees				
Action arose at:	Depositions				

Handwritten signature 'A'.

PROCEEDINGS

Date Order
Judgment No

1. Petition for Writ of Habeas Corpus-forwarded Petition to Judge Foley pur:
to order of Rotation and Assignment

2. Filed Memorandum-Decision and Order (1/4/74) denying and dismissing petition.
lack of Federal substance- SO ORDERED-HON. JAMES T. FOLEY

3. Filed Judgment

" Notice of Appeal -copies sent to Clerk, CCA and Castellani, Asst. Atty Gen

" Application for certificate of probable cause

" Memorandum-Decision and Order (1/22/74) granting certificate of probable

" Certificate of Probable Cause (SO ORDERED (Foley

" Motion for leave to appeal in forma pauperis and affidavit

" Order granting permission to prosecute appeal in forma pauperis

(A TRUE COPY.

A Daniel Insar

CLERK

3 VASBOT

A Carter
(clerk) deputy clerk

[Handwritten signature]

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, ex rel.

GEORGE FOYE,

PETITION FOR
WRIT OF HABEAS
CORPUS

Relator / Petitioner,

-against-

J. E. LAVALLEE, Superintendent of Clinton
Correctional Facility, Dannemora, New York,

Respondent.
-----X

TO THE HONORABLE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

The Petition of GEORGE FOYE, respectfully shows that:

1. Petitioner is a citizen of the United States of America and the State of New York.
2. Petitioner is at present unconstitutionally detained and imprisoned at the Department of Correctional Services, Clinton Correctional Facility, Dannemora, New York, within the District for which this Court sits, by the Respondent, J. E. LAVALLE, Superintendent of Clinton Correctional Facility, by virtue of a judgment and sentence pronounced by the County Court of the County of Sullivan on the 13th day of July, 1973, said judgment convicting the Petitioner of the Class A Felony of Murder, and sentencing him to an indeterminate

term of imprisonment, the minimum of which shall be fifteen years and the maximum shall be the term of the Petitioner's natural life.

3. That pursuant to the aforesaid judgment, Petitioner is detained by the Respondent, the Superintendent at the aforesaid Correctional Facility of the State of New York.

4. Petitioner has exhausted all state remedies as required by 28 U.S.C. Section 2254, appealing the convictions and sentencing of the County Court of the County of Sullivan to the Supreme Court of the State of New York, Appellate Division, Third Department. Said Appellate Division unanimously affirmed said conviction and sentencing, a copy of which Decision is annexed hereto and marked Exhibit "A-1". Thereafter, Petitioner sought permission to appeal to the Court of Appeals of the State of New York. Permission was denied by Certificate of HON. CHARLES D. BREITEL, denying leave, dated the 12th day of June, 1973, a copy of which is attached hereto and marked Exhibit "A-2".

5. That the Petitioner is restrained and imprisoned pursuant to a judgment and sentence that is illegal and void and that the Petitioner was denied due process of law as guaranteed by the 6th and 14th Amendments to the Constitution of the United States. The facts and circumstances under which the denial of Petitioner's denial of Constitutional Rights took place, are as follows:

(a) Your Petitioner and one DELOIS HARDEN were jointly indicted for the crime of murder by indictment of the Sullivan County Grand Jury dated the 29th day of February, 1972. A severance was granted by the Sullivan County Court and your Petitioner's case was commenced by the selection of a Jury on the 16th day of May, 1972. During the Petitioner's trial, before the Sullivan County

Jury, the PEOPLE, in their direct case called as a witness, INVESTIGATOR BROWN, the officer in charge of the investigation concerning the circumstances surrounding the death of the infant for which the Petitioner was charged with the crime of murder. On direct examination the officer testified as to his conversations with the Petitioner, GEORGE FOYE, and with a DELOIS HARDEN, who was charged in the same indictment as a co-defendant, and whose case was severed and who was the prosecution's principal witness against the Petitioner. INVESTIGATOR BROWN, also testified as to his conversations with other parties. On cross-examination, INVESTIGATOR BROWN, admitted that he had made notes and from the notes had prepared a written report which he had filed with his superiors, and that he, within a month prior to his testifying, had refreshed his recollection from this written report. (Transcript-Page 397-399)

TRANSCRIPT-P. 397-399

"Q. Investigator, did you testify at the Grand Jury ?

A. I did.

MR. DAVIDOFF: I ask that the Grand Jury testimony be produced of the witness, Your Honor.

THE COURT: All right.

Q. Investigator, did you make a report--

MR. DAVIDOFF: Strike that.

Q. Were you in charge of the investigation into the death of Michael Harden ?

A. Yes, sir.

Q. And you along with another investigator from the B.C.I. conducted almost the entire investigation ?

A. That's correct, sir.

Q. And did you write up a report as to your investigation ?

A. I did.

Q. And was this report which was written up in the regular course of writing up your reports ?

A. That's correct.

Q. And this is a report which is submitted to your superior ?

A. That's right.

Q. Did this contain all the notes that you had made and all the results of your investigation ?

A. It's the entire result of the investigation.

Q. Was this submitted to your superiors ?

A. It was.

Q. Where is that submitted to ?

A. Albany, New York.

Q. Is a copy of that report kept in your files here in Ferndale ?

A. There's a copy in the building, the final disposition folder at the Ferndale barracks.

Q. And did you review this folder within the last month ?

A. Yes, I would have read it over.

Q. And that contained the same things which you have testified to today, were those things also contained in that folder ?

A. Probably not verbatim.

Q. But the notes on what you have testified to today would that be in that report ?

A. Yes, it would be.

MR. DAVIDOFF: Your Honor, I ask that that report be produced.

MR. GELLMAN: Now, Your Honor, we have been on trial since last Tuesday and this case has been going on for some period of time. The proper procedure for obtaining records-

MR. DAVIDOFF: Objection, Your Honor, I would ask we discuss this outside the jury.

MR. GELLMAN: I don't see why I can't answer it.

THE COURT: Let's get down to the realistic situation instead of discussing the legal aspects of it. Is this report available and can it be produced ?

MR. GELLMAN: You have to ask the witness, I don't know.

A. The report is in the folder at the Ferndale barracks.

THE COURT: That can be produced at some subsequent time ?

A. Right.

THE COURT: You have no objection ? Do you have a right to under your authority ?

A. If the Court orders me, sir, I have to, I'm not going to be in contempt of court.

THE COURT: You can do it some other time.

MR. DAVIDOFF: May I make this suggestion, Your Honor, if possible the report could be produced during lunch and I can look at it during lunch.

THE COURT: We'll take that up after lunch.

MR. DAVIDOFF: I have a right to look at it during lunch.

THE COURT: If we have it here. I don't want to talk about the proper procedure but if you wanted that here you could have subpoenaed it.

MR. DAVIDOFF: Your Honor, the last time it was here.

THE COURT: We are getting it for you. If he's willing to produce it you have an opportunity to look at it during lunch and you can examine it after lunch. Now go on with other aspects of your cross-examination, if you have any. "

(b) Your Petitioner's attorney made the appropriate motions to the trial court judge for the production of that report and for it to be made available in its entirety for examination by your Petitioner's counsel. The trial court judge not only refused your Petitioner's counsel the right to inspect the notes and the written report of INVESTIGATOR BROWN, but allowed the notes and written report to be brought into the court and to be reviewed, not by the trial court judge, not by the Petitioner's counsel, but by the Assistant District Attorney, who was then instructed to turn over to the Petitioner's counsel, only those portions of the notes and State Police Report, which he, the Assistant District Attorney, believed was material. Out of the entire Report, Petitioner's counsel was entitled to see only a couple of sentence excerpts. (Transcript - Page 416-418)

TRANSCRIPT - P. 416-418

"MR. DAVIDOFF: Your Honor, at this time I would like to renew my request that I be provided with the report made by the witness, State Police report.

THE COURT: Well, as I understand it I directed the witness to produce and submit to you that report which sets forth and reflects any materiality to his direct testimony. I understand they do have that information here for you. Of course you asked for the entire report, right ?

MR. DAVIDOFF: That's right, Your Honor.

THE COURT: It's being limited to that portion that's material to his direct testimony and nothing else. I am directing them

to furnish you with a copy of that report. Do you understand that ?

MR. GELLMAN: It has already been furnished.

THE COURT: You have an exception then for the Court's denial to let you look at the entire report.

MR. DAVIDOFF: I would like the record to indicate I was not given an opportunity to look through the main report and it's an excerpt what was given to me, I was not shown any report.

THE COURT: Right.

MR. DAVIDOFF: I would also in order we may keep it straight, I was given those pieces of paper here by Mr. Gellman and I would request they be marked for identification.

THE COURT: They may be marked, I might also point out you wanted the entire report and you thought it was material. There's a procedure if it's not exempt under the law and that would be a subpoena. However, you requested it here after this witness' direct testimony and its limited to any matters to his direct testimony. That's the direction of the Court. I cannot direct the entire report be furnished to you.

MR. DAVIDOFF: I take exception to the Court's ruling.

THE COURT: You have an exception.
State Police Report marked Defendant's Exhibit E for identification.

State Police Report marked Defendant's Exhibit E for Identification."

(c) Attached hereto and made a part hereof and marked Exhibit "B" is a copy of the entire direct and cross-examination of INVESTIGATOR BROWN, from the transcript of the trial.

(d) The refusal of the trial court judge to allow Petitioner's counsel

the right to inspect and to use for the purposes of the cross-examination of INVESTIGATOR BROWN, the notes and written report of his investigation, (after he had been called as a witness on behalf of the PEOPLE and had given testimony on their behalf and had admitted that he had prepared a written report and submitted a written report to his superiors and had referred to that written report within a month of his testifying and refreshed his recollection at the trial and after the written report had been produced at the time of trial) was a violation of Petitioner's Constitutional Rights and a denial of due process of law as guaranteed by the 6th and 14th Amendments of the Constitution of the United States.

(e) Petitioner has conferred with his attorney and upon information and belief, is advised that the United States Supreme Court in JENCKS v. THE UNITED STATES, 353 U.S. 657, specifically reviewed this question and citing GOLDMAN v. THE UNITED STATES, 316 U.S. 129, stated at page 668 as follows:

"This Court held in Goldman v. United States, 316 U.S. 129, 132, that the trial judge had discretion to deny inspection when the witness "...does not use his notes or memoranda (relating to his testimony) in court..." We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see

them to determine what use may be made of them. Justice required no less."

(f) The New York State Court of Appeals, in PEOPLE v. ROSARIO, 9 N. Y. 2d 286, 173 N. E. 2d 881, 213 N. Y. S. 2d 448, citing as its authority, JENCKS v. THE UNITED STATES (supra), stated as follows at page 289:

"That a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand. As long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, defense counsel should be allowed to determine for themselves the use to be made of it on cross-examination."

(g) The Court of Appeals of the State of New York in PEOPLE v. MALINSKY 15 N. Y. 2d 86, reaffirmed its position as stated in PEOPLE v. ROSARIO, (supra) by saying at page 90:

"As to the later contention, the Court is of the opinion that Detective Sullivan's notes should have been turned over to the defendants for their inspection and possible use. We made it unmistakably clear in People v. Rosario (9 NY 2d 286) that defense counsel must be permitted to examine a witness' prior statement, whether or not it differs from his testimony on the stand, and to decide for themselves the use to be made of it on cross-examination, provided only that the statement "relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential" (p. 289). And, obviously, it matters not whether the witness is testifying upon a trial or at a hearing. In either event, "a right sense of justice" entitles the defense to ascertain what the witness said about the subject under consideration on an earlier occasion."

(h) The refusal of the trial judge to grant your Petitioner's counsels request to examine the notes and written report of INVESTIGATOR BROWN, when it was produced in court and available, was a deprivation of his Constitutional Rights as provided in the 6th Amendment of the Constitution as to confrontation and cross-examination of witnesses, and Petitioner was denied the due process of law as guaranteed by the 14th Amendment of the Constitution of the United States.

6. Petitioner was further deprived of his Constitutional Rights and is being held pursuant to a conviction which was obtained without due process of law and in violation of the 14th Amendment as follows:

(a) The overwhelming amount of testimony produced at the trial against your Petitioner was testimony illicit from the co-defendant, DELOIS HARDEN, and it is quite clear that without DELOIS HARDEN'S testimony, the only testimony against your Petitioner would amount to isolated assaults against the deceased, and would in no way be sufficient to sustain the conviction for murder.

(b) Both your Petitioner and DELOIS HARDEN were indicted for the crime of murder by indictment of the Sullivan County Grand Jury dated the 29th day of February, 1972. A severance was granted by the Sullivan County Court and your Petitioner's case was scheduled to, and did, commence by the selection of a jury on the 16th day of May, 1972. On the 12th day of May, 1972, four days prior to the date set for the commencement of your Petitioner's case, DELOIS HARDEN pleaded guilty before the Sullivan County Court Judge to a reduced charge of assault in the first degree and sentencing was adjourned until the 12th day of June, 1972, a date which would have been after the commencement and

anticipated completion of your Petitioner's trial.

(c) Attached hereto and made a part hereof as Exhibit "C" as if fully set forth herein at length, is a copy of the transcript of the proceedings on the 12th day of May, 1972, when DELOIS HARDEN entered her plea of guilty to the reduced charge. During your Petitioner's trial, and after DELOIS HARDEN had testified on direct examination as to the alleged beatings and other acts of your Petitioner against the deceased, DELOIS HARDEN was cross-examined in regard to her entry of the plea of guilty to the reduced charge of assault in the first degree, and more specifically as to her conversations with the District Attorney and the circumstances giving rise to her entering a plea of guilty to a reduced charge only four days prior to the inception of your Petitioner's trial.

(d) Set forth below is a copy of a portion of the Cross-examination of DELOIS HARDEN, from the transcript of the trial. (Transcript-Page 167-172)

TRANSCRIPT-P. 167-172

"Q. Did you have a conversation with anyone prior to coming into Court here as to your testimony that you gave the last couple of days ?

A. Did I have a conversation ?

Q. Did you discuss your testimony prior to coming in here ?

A. No, I didn't discuss my testimony.

Q. Did you have a meeting or did you have a conversation in the Grand Jury room within the last two weeks with anyone in regard to your testifying here today ?

A. No.

Q. You know where the Grand Jury room is in this building ?

A. Upstairs I believe.

Q. Now, within the last two or three weeks did you go up to the Grand -- were you taken up to the Grand Jury room or a room on the second floor of this building and have any conversation with any members of the District Attorney's Office in regard to your testifying here ?

A. District Attorney ? I had a meeting with the District Attorney, he asked me to tell the truth and I told him the truth.

Q. And that was on the second floor up here ?

A. Not in the Grand Jury room.

Q. Well, it's on the second floor in one of the rooms ?

A. Yes.

Q. And you had a conversation at that time ?

A. Not a conversation. Yes, I was asked questions and I was answering them.

Q. And was that conversation reduced to writing to your knowledge ?

A. No, it was not.

Q. You weren't asked to sign anything as a result of that ?

A. No, I was not.

Q. Was that prior to your pleading guilty - was that prior-was that before you pleaded guilty to assault in the first degree ?

A. Yes, it was.

Q. And it was after you were indicted for murder ?

A. I don't understand what you mean.

Q. That incident in which you had a discussion with the District Attorney was that after you had been indicted for murder ?

A. Yes, I believe so.

Q. And before you pleaded guilty to the reduced charge of assault ?

A. No, I believe it was after. I had a meeting before but I believe it was after I seen him again and I told him the truth.

Q. Was that meeting before last Friday ?

A. No. I had a meeting with him the other day.

Q. AND what day was that ?

A. I believe it was Monday.

Q. That would be --

A. No, it was Tuesday, Tuesday.

A. Tuesday of this week ?

Q. Yes.

A. And prior to your meeting on Tuesday of this week with the District Attorney upstairs you had never met with the District Attorney upstairs or any other place ?

A. Yes, I've seen him before.

Q. When was that ?

A. You asked me when was my last meeting.

A. No, I don't believe that's what I asked. I'm just asking did you have any meeting with the District Attorney anywhere in regard to these incidents after you were indicted for murder and before you pleaded guilty to assault ?

A. Yes.

A. And when was that ?

A. I can't give you the exact date.

Q. At that meeting did you discuss these incidents in which you have testified to ?

A. He asked me to tell him the truth and I told him the truth.

Q. And at that time you discussed these incidents, is that true ?

A. I didn't discuss, he asked me and I told him.

THE COURT: Did you tell the District Attorney about this at the time he asked you to tell the truth, did you tell it to the District Attorney ?

A. Yes, he asked me questions, yes.

THE COURT: And you told him some things about this ?

A. Yes.

THE COURT: All right. She did tell him.

Q. Was that the first time that any member of a law enforcement agency had asked you questions about what George Foye had done to Michael Harden ?

A. What do you mean, policeman, something like that ?

Q. Right ?

A. No, not really, just except when I got arrested when we was down at Middletown but he asked me questions.

Q. Did he ask you questions at that time as to George Foye's conduct towards Michael Harden ?

MR. GELLMAN: Who you talking about now, Mr. Davidoff ?

MR. DAVIDOFF: She said some--

THE COURT: Can't you specifically put in your question who you are talking about ? Are you talking now about a police officer in Middletown ?

MR. DAVIDOFF: Yes.

THE COURT: Did a police officer in Middletown at the time you were arrested ask you questions about this matter ?

A. No, he just asked me a couple of questions was George staying with me and that was all.

THE COURT: He asked you some questions, right ?

A. Yes.

THE COURT: All right. Next question.

Q. Did he ask you anything about what George Foye did to Michael Harden ?

A. No.

Recess. Court reconvened."

DELOIS HARDEN further stated, as follows: (Transcript-Page

182-187)

TRANSCRIPT-P. -182-187

"Q. Have you been sentenced yet ?

A. No.

Q. And when is your sentencing, do you know ?

A. June 12th.

Q. Were you subpoenaed here today ?

A. No.

Q. Did you voluntarily come into Court here today to testify ?

MR. GELLMAN: Now, Your Honor, I object to this.

THE COURT: Over ruled. She may answer.

A. Yes, I came voluntarily.

Q. And did you tell somebody that you would voluntarily come here today to testify ?

A. No.

Q. You never told anybody that you would voluntarily come here today to testify ?

MR. GELLMAN: Isn't that exactly what was asked and answered in the previous question, did you ask, and now you say you never asked, I object to this, Your Honor.

THE COURT: What's the question I'm concerned with now ?

Question repeated.

THE COURT: I'll sustain it because of the form. Rephrase it.

Q. Did anybody ask you to come here today to testify ?

A. No.

Q. Who brought you here today to testify ?

MR. GELLMAN: Object to this, Your Honor ?

THE COURT: Well, why do you object to that ?

MR. GELLMAN: First of all, what's the pertinency of who brought her here ? The fact that she's here testifying, isn't that sufficient in telling the story ?

THE COURT: I think he has a right to inquire how she got here. Over ruled. Who brought you here, if anybody brought you here ?

A. The Sheriff's Department matron.

THE COURT: The Sheriff's Deputy over here at the jail ?

A. Yes.

THE COURT: All right.

Q. Did you ever ask anyone in the Sheriff's Department to bring you over here to testify ?

A. No, I didn't ask anybody.

Q. Did you know that you were coming over this week to testify ?

A. Yes.

Q. How did you know ?

A. The D. A. told me I would probably come over here to testify one day this week.

Q. So the District Attorney told you you were coming over here to testify ?

A. Yes.

Q. And when was this that he told you this ?

A. When I seen him Tuesday.

Q. And that was after you plead guilty ?

A. Yes.

Q. And the time when you saw him prior to your pleading guilty did you have any conversation at that time in regard to your coming here to testify ?

A. Did--I don't understand what you mean.

Q. There was a time prior to your pleading guilty in which you had a conversation with the District Attorney, is that correct ?

A. Yes.

Q. And did he tell you at that time that he would have you testify at the trial of George Foye ?

THE COURT: Mr. Davidoff, aren't you getting into a matter now that is not a proper phase of this interrogation ?

MR. DAVIDOFF: I believe it is, Your Honor.

THE COURT: How can the District Attorney tell a defendant charged with murder to come in and testify ? I don't understand this type of cross examination you are conducting here.

MR. DAVIDOFF: Your Honor--

THE COURT: You are asking now whether the District Attorney asked a person who's charged with murder whether he asked her to come in and testify, a defendant in the case, is that what you are asking ?

MR. DAVIDOFF: A co-defendant.

THE COURT: No. Do you want to let him go into it, you may ?

MR. GELLMAN: I object. There is no co-defendant because this action was severed by Mr. Davidoff himself, only a co-defendant originally, he made the application for a severance.

THE COURT: Whether it's a co-defendant or not the District Attorney has no right to ask anybody who's charged with a crime before the case is disposed of to testify.

MR. DAVIDOFF: Your Honor, I don't know what occurred. I'm asking here-

THE COURT: Go ahead, I'll let you ask it, I don't see what it has to do with it but go ahead.

Q. You had--

THE COURT: What's your question now ? Don't make any statements, rephrase your question. Let's get down to the rules of evidence. I've given you enough latitude.

Q. During your conversation with the District Attorney prior to your pleading guilty after you were indicted for murder did you discuss the fact that you would testify at the trial of the defendant George Foye ?

A. Not while I was indicted for murder, no.

Q. When did you discuss it ?

MR. GELLMAN: Hasn't this been asked and answered ?

THE COURT: I think it has but let him go. Go ahead.

A. That I would testify - it wasn't really discussed until Tuesday.

Q. And it wasn't discussed before Tuesday ?

A. Not that I would testify.

Q. When did you decide to plead guilty to the reduced charge of assault in the first degree ?

MR. GELLMAN: I'm going to object to this, Your Honor.

THE COURT: He may go into it. Over ruled.

A. When did I decide to plead guilty ?

Q. Yes ?

A. I don't remember exactly."

(e) Your Petitioner's counsel specifically directed questions to DELOIS HARDEN in regard to whether or not she had voluntarily come into court to testify against your Petitioner. The Assistant District Attorney prosecuting the case objected to these questions and made no offer to explain how DELOIS HARDEN had been brought to the court to testify when she alleged that she had not been subpoenaed, and when she also alleged that she had not requested that the Sheriff bring her to the court to testify. The continuing objections by the Assistant District Attorney to the inquiry of your Petitioner's counsel when the Assistant District Attorney should have come forth and explained to the Court and the jury as to the circumstances surrounding her plead to a reduced charge and the bringing of DELOIS HARDEN to the court on that particular date to testify, were improper.

(f) As the testimony on previous pages indicates, DELOIS HARDEN

was vague and non-responsive when inquiry was made as to her conversations with representatives of the District Attorney and when these conversations occurred. The Assistant District Attorney made no attempt to explain to the court or to the jury that DELOIS HARDEN was cooperating with the District Attorney's Office, and as to whether or not in reward for her testimony, that some consideration would be given to DELOIS HARDEN at the time of sentencing. In actuality, there was a reward given to DELOIS HARDEN by the court at the time of sentencing for her cooperation with the District Attorney's Office, Attached hereto and made a part hereof, as if fully set forth herein at length and marked Exhibit "D" is a transcript of the proceedings in the Sullivan County Court on the 7th day of August, 1972, at which time DELOIS HARDEN was sentenced. At DELOIS HARDEN'S sentencing, the Assistant District Attorney, the same Assistant District Attorney who was the prosecutor at your Petitioner's trial, stated to the Court during his remarks upon making a recommendation, stated as follows:

PAGE 2-SENTENCING
OF DELOIS HARDEN

"MR. GELLMAN: Yes, I do, Your Honor. In this particular matter the defendant was originally charged with murder and then subsequently pleaded to assault in the first degree, in violation of section 120.10 of the Penal Law of the State of New York. Our office has thoroughly investigated this matter and based on the proof it was our determination that she was not as guilty of the original crime charged as the co-defendant was. Subsequently this defendant was very helpful to our case, gave us a great deal of information, testified on the trial as to all aspects of what occurred. Based on what we have learned, in the interests of justice we recommend that the defendant receive a sentence,

indeterminate sentence, of four years. "(underlining added)

The Court in its remarks at sentencing, at page 5, stated:

"It is important to this court to know that this defendant has cooperated with the prosecution in the case against GEORGE FOYE, who was convicted of murder, and the court feels that that is a very important feature of this case, in so far that the imposition of sentence is concerned. And the defendant should be rewarded to some extent for the cooperation that she gave the District Attorney, and the fact that she appeared and testified in this case, and the court will consider that an imposing sentence." (underlining added)

(g) If the statements of this witness with respect to her conversation with the District Attorney prior to the reduction of the charge against her from murder to assault, were untrue, as Petitioner believes them to be, and in fact the conversations had taken place between the Assistant District Attorney and the co-defendant before the charge against her were reduced concerning her cooperation and testimony at the trial of Petitioner and her statement upon trial were in fact false and incorrect, the Assistant District Attorney had a duty and obligation to bring forth the true facts and circumstances even though such may have impeached the credibility of his own witness. Had her credibility been so impeached on this issue, the jury may very well have disregarded her testimony on other issues resulting in a verdict other than Petitioner's guilty of murder.

(h) It is no coincidence that the co-defendant, DELOIS HARDEN pled guilty to a reduced charge four days prior to the commencement of your Petitioner's trial, and that the imposition of sentencing was delayed until the completion of your Petitioner's trial, and your Petitioner respectfully requests that it was an

obligation upon the District Attorney, at your Petitioner's trial to apprise the court, jury, and your Petitioner's counsel as to any promise, reward, or lienency that the witness was to expect in return for her willingness to take the stand for the prosecution. The failure of the prosecutor to correct the testimony of the witness which he knew to be false, denied your Petitioner due process of law in violation of the 14th Amendment.

(i) Petitioner has conferred with his attorney, and upon information and belief, has been advised that the United States Supreme Court in NAPUE v. ILLINOIS, 360 U.S. 264 at page 269, stated as follows:

"First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, Mooney v. Holohan, 294 U.S. 103; Pyle v. Kansas, 317 U.S. 213; Curran v. Delaware, 259 F. 2d 707. See New York ex rel. Whitman v. Wilson, 318 U.S. 688, and White v. Ragen, 324 U.S. 760. Compare Jones v. Commonwealth, 97 F. 2d 335, 338, with in re Sawyer's Petition, 229 F. 2d 805, 809. Cf. Mesarosh v. United States, 352 U.S. 1. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta v. Texas, 355 U.S. 28; United States ex rel. Thompson v. Dye, 221 F. 2d 763; United States ex rel. Almeida v. Baldi, 195 F. 2d 815; United States ex rel. Montgomery v. Ragen, 86 F. Supp. 382. See generally annotation, 2 L. Ed. 2d 1575."

(j) The New York Court of Appeals has recognized the Federal Law and in the case of PEOPLE v. SAVVIDES, 1 N.Y. 2d 554, 557; 136 N.E. 2d 853, 854-855; 154 N.Y.S. 2d 885, 887; stated as follows:

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has

the responsibility and duty to correct what he knows to be false and elicit the truth... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

More recently, the New York Court of Appeals in the case of PEOPLE v. WASHINGTON 32 N.Y. 2d 401, reaffirmed its support of this proposition and stated as follows:

"The prosecutor, who personally had given the assurances to Anderson, took no steps to tell the jury the truth of the matter. Were there no more, we would reverse and order a new trial."

From a review of the sentencing minutes and the circumstances surrounding the plea of guilty entered by the co-defendant, DELOIS HARDEN, four (4) days prior to the commencement of your Petitioner's trial, your Petitioner believes that portions of the testimony of DELOIS HARDEN, the chief witness produced by the People against your Petitioner, was incorrect. Your Petitioner believes that the Assistant District Attorney had knowledge that DELOIS HARDEN was giving untrue testimony and being vague and unable to recollect what he knew to be the facts. The cases cited above clearly indicate that the Assistant District Attorney had a duty and an obligation to bring forth the true facts and circumstances at your Petitioner's trial, even though the true facts and circumstances may have impeached the credibility of his own witness. The failure of the Assistant District Attorney to comply with his duty and obligation, was a denial of your Petitioner's Constitutional Rights as protected by the 14th Amendment to the Constitution, and it is respectfully requested that this Court set aside your Petitioner's conviction for the crime of murder.

WHEREFORE, Petitioner prays:

1. That a Writ of Habeas Corpus be directed to the Respondent issued in his behalf so that the Petitioner may be brought before this court.
2. That the Respondent be required to appear and answer the allegation of this Petition.
3. That, after a full complete hearing of the facts alleged herein, this court relieve Petitioner of the unconstitutional detention, imprisonment, and sentence of death, and that the court grant such other, further, and different relief as to the court may seem just and proper under the circumstances.

DATED: November 20, 1973

S/ George Foye

GEORGE FOYE--Petitioner

MICHAEL DAVIDOFF, ESQ.
Attorney for Relator/Petitioner
Office and P.O. Address
Ten Hamilton Ave., P.O. Box 809
Monticello, New York 12701
Tel. No. (914) 794-5110

STATE OF NEW YORK)
) SS:
COUNTY OF CLINTON)

GEORGE FOYE, being duly sworn, deposes and says:

That he had read the foregoing Petition for Writ of Habeas Corpus and knows the contents thereof; that the same is true to his knowledge except

as to those matters therein stated to be alleged on information and belief,
and as to those matters, he believes it to be true.

S/ George Foye

GEORGE FOYE

Sworn to before me this 20
day of November, 1973.

S/ Henry G. Briquer

Notary Public

Supreme Court—Appellate Division
Third Judicial Department

April 19, 1973

19513

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

GEORGE FOYE, Appellant.

Judgment, County Court, Sullivan County (Newberg, J.), rendered on
July 12, 1972, affirmed. No opinion.

STALEY, JR., J.P., GREENBLOTT, SWEENEY, KANE and MAIN, JJ.,
concur.

EXHIBIT "A-1"

State of New York Court of Appeals

BEFORE: HON. CHARLES D. BREITEL, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

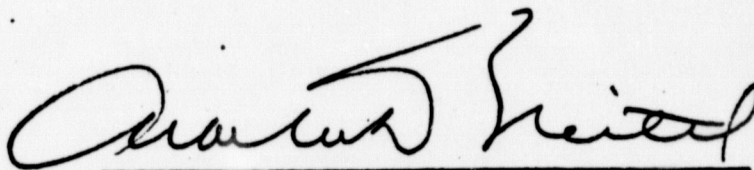
against
GEORGE FOYE,

Defendant-Appellant.

CERTIFICATE
DENYING
LEAVE

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated New York , New York
June 12 , 19 73



Associate Judge

*Michael Davidoff, Esq.
10 Hamilton Avenue
Monticello, New York 12701

Hon. Louis B. Scheinman
District Attorney, Sullivan Co.
Court House
Monticello, New York

Clerk, Court of Appeals

*Briefs and other papers returned herewith

*Description of Order:

5-3-73 App. Div. 3rd Dept. affmd. 7-13-72 Sullivan Co. Ct.

CLAYTON D. BROWN, being duly sworn, testified as follows:

Direct examination by Mr. Gellman

- Q. Sir, what is your occupation?
- A. I'm an Investigator with the Division of State Police.
- Q. And for how long have you been with the New York State Police?
- A. It will be ten years the 18th of June.
- Q. And where are you stationed?
- A. Ferndale, New York.
- Q. On October 24th, 1971 did you have an opportunity to speak to George Foye?
- A. I did.
- Q. And where did this take place?
- A. At Horton Memorial Hospital in Middletown, New York.
- Q. And where in that hospital did this take place?
- A. It was in a little rest area in one of the hallways.
- Q. What was your conversation, starting at the beginning, what did you say to him and what did he say to you initially?

MR. DAVIDOFF: Objection, Your Honor.

THE COURT: Over ruled. What's the date of this?

MR. GELLMAN: October 24th, 1971.

THE COURT: All right. October 24th, 1971. All right.

Q. Is that the correct date?

A. Yes, sir.

Q. Had you ever met George Foye before?

A. No, sir.

Q. How did you know it was George Foye that you spoke to, did he identify himself to you?

A. I identified myself to him and he told me his name was George Foye.

Q. Can you identify George Foye at this time?

A. Yes, the gentleman sitting there.

Q. Sitting next to Mr. Davidoff at the table?

A. Yes.

Q. Now, please tell us what your conversation was at that time--

MR. GELLMAN: I'll withdraw it.

Q. What time did this occur?

A. Approximately 9:30 P.M.

Q. Go ahead, tell us what was said?

A. I advised Mr. Foye he did not have to say anything, anything he said could and would be used against him in a court of law, he had the right to have an attorney present during any questioning, in the event he could not afford an attorney an attorney would be appointed for him free of charge. I

then asked him if he understood what I told him and he said, "Yes."

Q. Anything else?

A. I asked him if he wanted an attorney present, he said he didn't need one.

Q. Did you then have a conversation with him?

A. I did.

Q. What did you say to him and what did he say to you at that time?

A. I asked him what had caused the condition of Michael Harden he was presently in the hospital there at Horton.

Q. And?

A. He told me that he had been sleeping on the couch and that he had been awoken by Delois Harden and she told him that Michael had fell against the radiator and become unconscious.

Q. Did you have any further conversation with him?

A. I asked him what accounted for the old bruises on the child's body, he related that he had disciplined the child with his hands and a belt.

Q. Did you ask him on how many occasions this occurred or when it occurred?

MR. DAVIDOFF: Objection, Your Honor, leading and suggestive.

THE COURT: Sustained.

Q. Did you ask him any further questions concerning this?

A. I asked him how long he had been living with Delois Harden, he related approximately two and a half years.

Q. Did you have any other conversation other than what you have given us relating to George Foye and Michael Harden?

A. I asked him why he had disciplined the child with his hands and the belt, he related that the child didn't do as he was told.

MR. GELMAN: No further questions.

Cross examination by Mr. Davidoff

Q. Investigator, did you testify at the Grand Jury?

A. I did.

MR. DAVIDOFF: I ask that the Grand Jury testimony be produced of this witness, Your Honor.

THE COURT: All right.

Q. Investigator, did you make a report--

MR. DAVIDOFF: Strike that.

Q. Were you in charge of the investigation into the death of Michael Harden?

A. Yes, sir.

Q. And you along with another Investigator from the B.C.I. conducted almost the entire investigation?

A. That's correct, sir.

Q. And did you write up a report as to your investigation?

A. I did.

Q. And was this report which was written up in the regular course of writing up your reports?

A. That's correct.

Q. And this is a report which is submitted to your superior?

A. That's right.

Q. Did this contain all the notes that you had made and all the results of your investigation?

A. It's the entire result of the investigation.

Q. Was this submitted to your superiors?

A. It was.

Q. Where is that submitted to?

A. Albany, New York.

Q. Is a copy of that report kept in your files here in Ferndale?

A. There's a copy in the building, the final disposition folder at the Ferndale barracks.

Q. And did you review this folder within the last month?

A. Yes, I would have read it over.

Q. And that contained the same things which you have testified to today, were those things also contained in that folder?

A. Probably not verbatim.

Q. But the notes on what you have testified to today would that be in that report?

A. Yes, it would be.

MR. DAVIDOFF: Your Honor, I ask that that report be produced.

MR. GELLMAN: Now, Your Honor, we have been on trial since last Tuesday and this case has been going on for some period of time. The proper procedure for obtaining records-

MR. DAVIDOFF: Objection, Your Honor. I would ask we discuss this outside the jury.

MR. GELLMAN: I don't see why I can't answer it.

THE COURT: Let's get down to the realistic situation instead of discussing the legal aspects of it. Is this report available and can it be produced?

MR. GELLMAN: You have to ask the witness, I don't know.

A. The report is in the folder at the Ferndale barracks.

THE COURT: That can be produced at some subsequent time?

A. Right.

THE COURT: You have no objection? Do you have a right to under your authority?

A. If the Court orders me, sir, I have to, I'm not going to be in contempt of court.

THE COURT: You can do it some other time.

MR. DAVIDOFF: May I make this suggestion, Your Honor, if possible the report could be produced during lunch and I can look at it during lunch.

THE COURT: We'll take that up after lunch.

MR. DAVIDOFF: I have a right to

look at it during lunch.

THE COURT: If we have it here.
I don't want to talk about the proper procedure
but if you wanted that here you could have subpoenaed
it.

MR. DAVIDOFF: Your Honor, the
last time it was here.

THE COURT: We are giving it for
you. If
He's willing to produce it you have an oppor-
tunity to look at it during lunch and you can
examine it after lunch. Now go on with other
aspects of your cross examination, if you have
any.

Q. Investigator Brown, did you have a conversation
on the night of October 24th, 1971 with anyone
else?

A. Yes, I did.

Q. And who was that with?

A. Delois Harden.

Q. And where was that conversation?

A. In the same area in the Horton Memorial Hospital
in Middletown, New York.

Q. Was that conversation prior to the conversation
with George Foye?

A. It was.

Q. Why were you down at Horton Memorial Hospital on

that evening?

A. I had been advised by the Monticello Police Department of a possible child abuse case.

Q. And who advised you?

A. Sgt. Bisland.

Q. And what exactly did Sgt. Bisland tell you?

A. That there had been a report to his Department of a possible child abuse case.

Q. And his Department called your's?

A. That's correct.

Q. And therefore you went down there with the idea of investigating a possible child abuse case?

A. That's correct.

Q. And prior to going down to Horton Memorial Hospital, did you go anywhere else?

A. After I received the call from the Police Department?

Q. Right?

A. No.

Q. And did you go down there alone?

A. No.

Q. Who did you go down with?

A. Investigator Topping.

Q. Prior to going down there had you made any calls to any other members of the State Police?

A. I had.

Q. And who was this?

A. Investigator Catazone.

- Q. And you told him to meet you there?
- A. I asked him to go to the hospital and check on the condition of the child.
- Q. And in fact when you got down there he had arrived before you?
- A. He was at the hospital.
- Q. Did you have any conversation with that Investigator prior to your talking to either Delois Hardon and George Foye?
- A. I asked him the condition-
- Q. Did he tell you the condition of the child?
- A. He said the child was up in the operating room.
- Q. Did you have any conversations with any of the nurses or doctors prior to talking to Delois or George?
- A. Yes, I spoke to what I believe was the head nurse on duty.
- Q. And what was the essence of that conversation?
- A. She merely reported--

MR. GELLMAN: Object to this,
Your Honor.

THE COURT: I can understand where it would be hearsay as far as his defendant but if he's asking it--

MR. GELLMAN: All right. I withdraw my objection.

Q. Did you discuss the condition of the child?

A. I asked the condition of the child, yes.

Q. Did you ask anything about the parents at that time?

A. She related that they were in the waiting room.

Q. And is that how you knew to go to the waiting room?

A. Right.

Q. When you went to the waiting room which parent did you speak to first?

A. Delois Harden.

Q. And was George Foye present when you spoke to Delois Harden?

A. When I first spoke to her you mean?

Q. What's the first thing you said--

MR. DAVIDOFF: I withdraw that.

Q. Who was the first one you spoke to, Delois Harden or George Foye?

A. Delois Harden.

Q. Was George Foye present?

A. He was.

Q. What's the first thing you said to Delois Harden?

A. I identified myself.

Q. As Investigator Brown?

A. Yes.

Q. What was the next thing you said?

A. And I introduced Investigator Topping.

Q. And then what?

A. I asked Delois Harden if she would talk to me about the condition of the child.

Q. And what did she say?

A. She said, "Yes."

Q. Did you then have a conversation with Delois Harden?

A. I did.

Q. And was George Foye present?

A. No.

Q. Now, what was your conversation, what did you say to Delois Harden and what did Delois Harden say to you?

A. I advised her that she did not have to tell me anything, anything she said could be and would be used against her in a court of law, she had the right to have an attorney present during any questioning, in the event she could not afford an attorney an attorney would be provided for her free of charge. I asked her if she understood and she said, "Yes", asked her if she wanted an attorney, she said she didn't need one.

Q. Did you then have some more conversation?

A. Right.

Q. What did she say -- what did you say to her and what did she say to you, if anything?

A. I asked her what had happened to her child Michael.

Q. And what if anything did she say?

A. She said she had been I believe it was the kitchen of the apartment preparing a meal, had been advised that Michael had fell against the radiator and struck his head and became unconscious.

Q. Have any further conversation?

A. I asked her relative to the old bruises on the child's body.

Q. What if anything did she say?

A. She said she had beat him with a belt and her hands because he pissed on the floor and shit on himself.

Q. She said that to you on that date? What else?

MR. GELLMAN: Your Honor, why do we have to have this? I object to these statements by counsel. After four days I think we ought to stop it.

Q. What else did you say to her and she say to you?

A. I asked her how long she had been living with George Foye, she told me approximately two and a half years.

Q. Anything else?

A. Not that I can specifically recall.

Q. Investigator, would it be more specific that her answer to you was that when you asked her about the bruises she said she had licked the kid be-

cause he had shit on himself or pissed on the floor and shit on himself and didn't go to the toilet like he was supposed to, that he didn't do other things that she told him to, would that be more specific as to her answer towards you at that time?

A. Quite possible.

Q. Did you have any discussion at that time with her with regard to any seizures?

A. Yes, I did.

Q. Could you tell this jury what you said to her and what she said to you?

A. I asked her why the child fell into the radiator or something similar to that. She said the child had had seizures since the age of approximately one year old.

Q. She tell you she had struck the child on numerous occasions?

A. I believe the question I asked her was how often she had done this and she said when he performed these acts.

Q. Did she ever tell you she had struck the child on numerous occasions?

A. Her exact wording I wouldn't be able to say.

MR. DAVIDOFF: Your Honor, I ask that this be marked as exhibit B, Defendant's exhibit B.

THE COURT: It may be marked.

Copy of Supporting Deposition
marked Defendant's Exhibit D for Identification.

MR. DAVIDOFF: I would like a
moment, Your Honor.

THE COURT: All right.

MR. DAVIDOFF: Your Honor, I
would like to amend that request about having
this marked, this was a copy in my file, I see
there's the original here, could I have the original
marked instead?

THE COURT: I guess so.

MR. DAVIDOFF: Can I take it
out of here, Your Honor?

THE COURT: Why don't you
mark the original and use the copy. Is that a
photostatic copy?

MR. DAVIDOFF: All right, mark
the original. You have no objection, have you,
Mr. Gellman?

MR. GELLMAN: I have no objec-
tion. I don't even know what he's doing, Your
Honor.

THE COURT: Mark the original
and you can use the copy, Mr. Davidoff.

Q . Investigator, I ask you to look at defendant's
exhibit D and ask you to please look at that.

MR. GELMAN: Excuse me. Didn't you mark the Grand Jury testimony as exhibit D?

MR. DAVIDOFF: I didn't mark it as anything.

MR. GELMAN: Oh, I'm sorry.

Q. Investigator, would you tell us what that is?

A. This is a supporting deposition which supports an accusory instrument.

Q. And do you recognize -- have you ever seen that before?

A. Yes, I signed it.

Q. And is that -- does that contain your statements?

A. Yes.

Q. Now, does that refresh your recollection as to whether or not Delois Harden ever told you that she struck Michael Harden on numerous occasions?

A. I believe I testified to the fact that she said she had done this on occasion when he didn't do as he was told or shit and pissed on himself.

Q. My question to you, Investigator, was does that refresh your recollection that Delois Harden told you that she struck Michael Harden on numerous occasions?

A. Yes.

Q. She did. Did you ask her at this time any questions in regard to the old bruise on Michael Harden?

A. Yes, that's where I received this response.

Q. That's when you received that response to the question?

A. Yes.

MR. GELMAN: Now, Your Honor, do we have to have repeating again, it's exactly what the witness says. I don't understand it. I object to it.

THE COURT: I think he's answered the question hasn't he? We have arrived at that hour where I guess we are not as alert. What's your question?

Q. Did you have--

THE COURT: What was your last question? Was that answered and answered?

MR. DAVIDOFF: My last question I believe, Your Honor, was that the response given at the time when he asked her questions as to the old bruises.

THE COURT: Yes, he said that's when the answer was given, right?

A. Yes.

THE COURT: Next question.

Q. Did you have any conversations at this time with Delois Harden in regard to the actions of George Foyo?

A. I asked her if Mr. Foyo had disciplined the

child, yes.

Q. And what if anything did she tell you?

A. She didn't want to talk about it.

Q. Did you ask her any other questions in relation to the actions of George Foye?

A. I asked her how long she had been living with Mr. Foye.

Q. Did she ever tell you Mr. Foye beat Michael Harden?

A. During this conversation?

Q. ?During this conversation?

A. No.

Q. Did she ever tell you during this conversation she was afraid of George Foye?

A. No.

Q. Did she ever tell you during this conversation that George Foye struck her?

A. No.

Q. Did she ever tell you George Foye threatened her?

A. No.

Q. Did she ever tell you the defendant did anything at all to Michael Harden?

A. No.

Q. Investigator, I ask you to please look at People's exhibit two which is in evidence. Have you ever seen that before?

A. Yes, I have.

Q. And tell us when you first saw it--

MR. DAVIDOFF: I withdraw that question.

Q. Tell us who gave it to you?

A. Delois Harden.

Q. And was that when you arrested Delois Harden?

A. That's correct.

Q. What did you arrest Delois Harden for at that time?

A. Endangering the welfare of a child/

Q. And upon a question by you did Delois Harden give you this bolt?

A. She did.

Q. Was this bolt ever sent--

MR. DAVIDOFF: I withdraw that.

Q. Was this bolt within your custody and possession since the time of your arrest of Delois Harden other than when it may have been used for different Court purposes?

A. It's been in the evidence locker at the Ferndale State Police Barracks.

Q. Under your control?

A. State Police control.

Q. Well, you are the one in charge, Investigator?

A. Right.

Q. And you would be the one who had to go and take it out when it was necessary?

A. That's right.

Q. Did you ever send it to the State Police laboratory in Albany to be analyzed?

A. I did not.

Q. Did you ever check and see whether there were any--

MR. DAVIDOFF: I withdraw that.

Q. Did you ever have the belt checked to determine whether or not there were any blood stains or other things involved on the belt?

A. No, I did not.

Q. You didn't check it yourself?

A. No.

Q. Did there come a later time when you arrested Delois barden for another crime?

A. After the 25th?

Q. Yes?

A. Yes.

Q. And for what crime was that?

A. Manslaughter in the first degree.

Q. And when did you arrest her?

A. January 12th, 1972.

Q. And was that because of the incidents arising out of this same thing which we are talking about?

A. That's correct.

Q. Now, prior -- now, between the time in which you arrested her the first time on October 25th for endangering the welfare of a minor--

A. Endangering the welfare of a child.

Q. And up until the second time that you arrested her, other than the fact that Michael Harden died, did any other information come to your knowledge regarding the investigation of this case?

A. No.

Q. I'm sorry?

A. Not that I recall, no.

Q. Now, it's true you also arrested George Foye on October 24th, is it not?

A. Yes, it is. No, that's not true.

Q. 25th. And you arrested George Foye on October 25th for what crime?

A. Endangering the welfare of a child.

Q. Did you arrest him at another time?

A. Yes, I did.

Q. And that was in the month of January?

A. No, I did not arrest him.

Q. Were you requested though to -- did you have anything to do with the arrest of George Foye in January, 1972?

A. I returned him here from the State Police, Tarrytown, New York.

Q. You were in charge of the investigation of the death of Michael Harden, is that correct?

A. Correct.

Q. And in between October 25th, 1971 when you

- arrested George Foye and in January 1972 when you went down to get him what was the charge then?
- A: Manslaughter in the first degree.
- Q. Now, between those two dates other than the death of Michael Harden was there any other information which came your way concerning this incident which we are discussing?
- A. Not that I recall.
- Q. Now, under whose -- the deposition which supported the charge of manslaughter in the first degree, was that signed by you?
- A. That's correct.
- Q. And under whose request was that deposition signed and filed?
- A. I don't believe I understand the question.
- Q. Did you have a conversation with somebody in regard to filing that deposition charging George Foye and Delois Harden with manslaughter in the first degree?
- A. That was discussed with my superiors and the District Attorney of Sullivan County.
- Q. And it was after you had these discussions with the District Attorney that you filed the information?
- A. You mean the supporting deposition?
- Q. The supporting deposition which backed you up,

the information?

A. The supporting deposition was filed on the 18th day, the original date of the preliminary hearing.

Q. That was filed after then the information was requested by a Judge, is that correct?

A. After the accusory--

MR. GELMAN: I don't know if a Judge requests an information. I say it's improper and probably never happened.

MR. DAVIDOFF: I withdraw it, Your Honor, if that's what he said.

Q. There came a time in January, 1972 when you went before a Judge and requested that he issue a warrant for the arrest of George Foye and Delois Harden for the charge of manslaughter in the first degree?

A. That's correct.

Q. And at your request did the Judge issue that warrant?

A. On the filing of an accusory instrument.

Q. Who filed that accusatory instrument?

A. I did.

Q. And then later on there came a time when you filed a deposition which supported that instrument?

A. That's correct.

Q. Now, prior to this time in between October 25th, 1971 when you had arrested George Foye and Delois Harden on those prior charges and in January, 1972 when you filed for the warrant did you know--

MR. DAVIDOFF: Strike that.

Q. Was George Foye in jail during that period of time?

MR. GELLMAN: Objection, Your Honor.

THE COURT: What's that got to do with the arrests?

MR. DAVIDOFF: I think it's pertinent, Your Honor.

THE COURT: Objection sustained. I think at this time, ladies and gentlemen, we will recess for lunch.

Court adjourned until 2:30 this afternoon.

Court reconvened at 2:30 P.M.
Defendant in Court.

THE COURT: All right, Mr. Davidoff.

MR. DAVIDOFF: Your Honor, at this time I would like to renew my request that I be provided with the report made by the witness, State Police report.

THE COURT: Well, as I understand

it I directed the witness to produce and submit to you that report which sets forth and reflects any materiality to his direct testimony. I understand they do have that information here for you. Of course you asked for the entire report, right?

MR. DAVIDOFF: That's right,
Your Honor.

THE COURT: It's being limited to that portion that's material to his direct testimony and nothing else. I am directing them to furnish you with a copy of that report. Do you understand that?

MR. GELLMAN: It has already been furnished.

THE COURT: You have an exception then for the Court's denial to let you look at the entire report.

MR. DAVIDOFF: I would like the record to indicate I was not given an opportunity to look through the main report and it's an excerpt what was given to me, I was not shown any report.

THE COURT: Right.

MR. DAVIDOFF: I would also in order we may keep it straight, I was given those pieces of paper here by Mr. Gellman and I would

request they be marked for identification.

THE COURT: They may be marked.

I might also point out you wanted the entire report and you thought it was material. There's a procedure if it's not exempt under the law and that would be a subpoena. However, you requested it here after this witness' direct testimony and it's limited to any matters to his direct testimony. That's the direction of the Court. I cannot direct the entire report be furnished to you.

MR. DVIDOFF: I take exception to the Court's ruling.

THE COURT: You have an exception.

State Police Report marked
Defendant's Exhibit E for Identification.

State Police Report marked
Defendant's Exhibit F for Identification.

Q. Now, Investigator, did you have occasion to speak to a Gloria Jones during your investigation of this incident?

A. I did.

Q. Could you tell us the dates on which you spoke to Gloria Jones?

A. May 4th, 1972.

Q. And did you ever speak to Gloria Jones prior to

that time?

A. No.

Q. Did you know that Gloria Jones lived in the same apartment building as George Foye and Eloin Harden?

A. I did.

Q. Did you know that prior to May 4th, 1972?

A. I did.

Q. And did you know prior to May 4th, 1972 that Gloria Jones was a frequent visitor at the apartment of Harden and Foye?

A. I did.

Q. And you never thought it was necessary to discuss this case with her prior to May 4th, 1972?

A. I didn't discuss it with her prior to May 4th, 1972, no.

Q. Do you have any knowledge whether any other Investigators of the State Police pursuant to your request or otherwise have a discussion with Gloria Jones?

A. To the best of my knowledge, no.

Q. Investigator, did you ever have a discussion with Lee Parham?

A. That's correct.

Q. And when did that occur?

A. I believe the date was February 12th, 1972.

Q. Do you know?

A. It could have been February 10th. It was February 10th.

Q. And did you know that Lee Parham had been present in the apartment of George Foye and Delois Harden on October 24th, 1972 prior to February in 1972?

A. Yes, I found this out I believe the date was February 8th.

Q. That was the first time that you knew that Lee had been in that apartment?

A. Knew that she was the one who was there, yes.

Q. How about Margie Marcel?

A. Never heard of her.

Q. Did you know at any time who was in the apartment on October 24th, 1972 prior to February 10th, 1972 on--

MR. DAVIDOFF: Let me withdraw that question.

Q / Prior to February of 1972 did you at any time know who had been present in the apartment on October 24th, 1971 prior to the time when Michael Harden was rushed to the hospital?

A. I was told a subject by the name of Marge Manso.

Q. Manso?

A. That's how it was pronounced to me, yes.

Q. Did you make any attempt to locate that subject?

A. Yes, sir.

Q. Did you have any success?

A. Yes, I located her on February 10th.

Q. So what you are saying that between--

MR. DAVIDOFF: I withdraw that question.

Q. Between October 24th, 1971 and February 10th, 1972 did you make any investigation into this matter by investigating witnesses or other people?

A. Yes.

Q. Can you give me a list of those people who you spoke to?

A. Clarence Williams, Iona Kelly, Elizabeth Roberts, Eva Roberts, Patricia Hanlon, Lorraine Harden, and one who lived at 382 Broadway but at this time I can't recall her name.

Q. Investigator, do you know if any of those were present in the apartment with George Foye and Delois Harden on October 24th, 1971?

A. Did I know that on October 24th or do I know that now?

Q. Do you know now whether any of those people that you just mentioned were present on October 24th, 1971 in the apartment of George Foye and Delois Harden?

A. Magdalene Trato and Ann Lee Parham.

Q. When was the first time that you knew Ann Lee Parham was present in the apartment?

MR. GELMAN: Your Honor, I'm going to object to this.

MR. DAVIDOFF: I know I asked it before but I'm not clear on the response on my previous question, maybe I misunderstood myself.

THE COURT: Let him answer it. Do you remember when you first found out that this Parham allegedly was in the apartment?

A. First time I had positive information of this, Your Honor, was I believe the date was February 8th, 1972.

Q. Did you have information prior to that time which led you to believe she might have been in the apartment on that day?

MR. GELMAN: Your Honor, what's the purpose of this?

THE COURT: I don't know either.

MR. GELMAN: I object to it.

THE COURT: Sustained.

Q. Did you ever ask--

MR. DAVIDOFF: Strike that, Your Honor.

Q. Now, when you questioned George Foye on October 24th, 1971 what did he tell you had occurred at

that time?

MR. GELMAN: Judge, didn't we go through that this morning on cross examination completely, complete conversations he had with George Foye.

MR. DAVIDOFF: No, not on cross examination, Your Honor.

THE COURT: All right. You may inquire.

A. Could I have the question repeated please?

Question repeated.

A. He related that he had been sleeping on the couch at the apartment at 17 Pelton Street and had been awoken by Delois Harden and advised that Michael Harden had fell against the radiator and become unconscious.

THE COURT: Didn't you go into that, Mr. Davidoff?

MR. DAVIDOFF: No, Your Honor, I don't recall.

MR. GELMAN: Your Honor, may I state I remember this testimony.

THE COURT: I do too, but go ahead. What's the next question?

Q. Did you ask George Foye anything about how the old bruises - anything about the new and old bruises?

MR. GELMAN: Object on the ground it has been asked and answered.

MR. DAVIDOFF: I don't recall asking these questions on cross examination.

THE COURT: I remember you reading from a book and you went into it.

MR. DAVIDOFF: I asked, Your Honor, about Delois Harden, conversation between him and Delois Harden, never as to George Foye.

THE COURT: All right. Read the question back.

Question repeated.

A. I did.

Q. And what did he tell you?

A. That he had disciplined the child with his hands and a belt because he didn't do as he was told.

Q. Did he say he used his hands and a belt?

A. Yes.

Q. And that was in response to a question about old bruises?

A. Right.

Q. Investigator, you recall testifying at the Grand Jury proceedings?

A. I do.

MR. DAVIDOFF: And would you give me the date please, Mr. Gellman?

MR. GELLMAN: February 8th, 1972.

Q. Investigator, do you recall at the Grand Jury proceedings on February 8th, 1972 being asked these questions and giving these answers, "Q--

MR. GELLMAN: What page?

Q. 49. "Q. What was the conversation you had with George Foye? A. I asked him in respect to the bruises on the child the name as I asked Delois Harden and he said on occasion he had to discipline the child when the child did not do as he instructed him. Q. Any further questions, any description of the disciplining, anything else in that conversation? A. No, he did not want to talk about it. Q. So the sum and substance was he disciplined the child when the child did not do what he instructed him and did not say the manner in which he disciplined him? A. No, and in the conversation with both subjects Harden and Foye they stated the child became unconscious from falling against the radiator from what she described as a seizure." Now, do you recall these questions being asked of you and giving these answers?

A. If they are there they must have been asked and I gave the answers.

Q. Were they true at the time you gave them?

A. That's right.

Q. Was your recollection better on February, 1972 as regarding the events which occurred in October, 1971 or is it better today in May, 1972?

A. I don't believe I could answer that question.

Q. Was that true when you testified to it February 8th, 1972?

A. To the best of my recollection, yes.

Q. Is your recollection better today or was it better in February?

A. I couldn't answer that.

MR. DAVIDOFF: Your Honor, I ask that defendant's exhibit D which is marked for identification be entered as evidence, this is a copy of it.

THE COURT: Show it to Mr. Gellman. Any objection?

MR. GELLMAN: May I have preliminary on this, voir dire on this?

THE COURT: Yes.

Preliminary examination by Mr. Gellman

Q. Now, Investigator Brown, this is a supporting deposition that you signed before the court, is that correct?

A. That's correct.

Q. And there's apparently another page which would indicate the date that was signed?

A. The original is in the file that they had here this morning, Mr. Gellman.

Q. I show you the original and ask you if you can identify that?

A. Yes.

Q. And that was signed when?

A. The 18th day of January, 1972.

Q. And this was in support of a charge against Delois Harden and George Foye?

A. Yes.

Q. And at that time was that the only paper that you presented to the court for signing?

A. There was an accusatory instrument.

Q. And was there any other deposition at that time produced?

A. One against Delois Harden and one against George Foye.

MR. GELLMAN: I have no objection.

THE COURT: All right, may be

received.

D

Defendant's exhibit D marked in
Evidence.

Cross examination by Mr. Davidoff, con't.

Q. Investigator, do you recall on October 24th asking George Foye whether or not he had disciplined Michael Harden on that particular day?

A. I don't recall, the question probably was asked, yes.

Q. You recall the answer?

A. I believe he replied no. I don't recall asking the question.

Q. Investigator, I show you defendant's exhibit, marked E for identification which I believe is notes from your report, is that not so?

A. That's correct.

Q. I ask you to please take an opportunity to read that over. Investigator, does that refresh your recollection as to whether or not on October 24th you inquired of George Foye whether or not he had disciplined Michael on that particular day and what if anything his response to you was?

A. He replied he had not disciplined him that day. I don't know the exact wording but he related he had not disciplined him that day.

MR. DAVIDOFF: I have no further questions, Your Honor.

Re-direct examination by Mr. Gellman

Q. Now, I show you this same defendant's exhibit C for identification and ask you to read this portion.

MR. DAVIDOFF: Your Honor, I object to that, this is not in evidence, I didn't ask him to read anything.

MR. GELLMAN: To himself. All right, I'll withdraw that.

Q. At any time in speaking to George Foye on 10/24/71 did Goye admit striking the child with the belt on previous occasions when the child failed to do as he had been instructed by him?

MR. DAVIDOFF: Your Honor, I object to this.

THE COURT: Didn't he already testify to that on direct examination?

MR. GELLMAN: Not in relation to this exhibit the way it's been read by other counsel, Your Honor.

THE COURT: Objection sustained. He's already testified.

MR. GELLMAN: I have no further questions.

THE COURT: Now, when I sustained the objection I didn't want to preclude you from trying to rehabilitate this witness insofar as any alleged inconsistency in the Grand Jury

testimony is concerned. You want to ask him whether he make a report in that respect which is consistent with his direct testimony you have a right to do it but not on the basis that you put it in.

Q. Now, in the Grand Jury testimony, Mr.--

THE COURT: He's already gone into that hasn't he?

MR. GELMAN: Part of that was read by Mr. Davidoff.

THE COURT: You want to read something else, some other testimony he gave?

MR. GELMAN: I'm referring to that aspect of the testimony that was read to him.
Q. Have you ever made a statement or writing that was different that sets forth that George Foye did strike Michael Harden with the belt?

MR. DAVIDOFF: Objection, Your Honor.

THE COURT: Sustained. In that form the objection is sustained..

MR. GELMAN: I have no further questions.

MR. DAVIDOFF: No questions.

MR. GELMAN: You may step down, Investigator Brown.

COUNTY COURT : SULLIVAN COUNTY

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

-against

DELOIS HARDEN,

Defendant.

-----X
Present:

HON. BENJAMIN NEWBERG,
Sullivan County Judge.

Appearances:

Hon. Emanuel Gellman, Assistant District Attorney,
appeared for the People.

Hon. Ira Jay Cohen, Public Defender, attorney for
defendant.

The following proceedings were held at the Court
House in the Village of Monticello, Sullivan County, New
York, on the 12th day of May, 1972 at two P.M.

Defendant in Court.

THE COURT: All right, gentlemen, the Court is now ready to record any appropriate remarks relative to this matter. What matter are we talking about?

MR. GELLMAN: Matter of Delois Harden

THE COURT: People against Delois Harden, charged with what?

MR. GELLMAN: The crime of murder.

THE COURT: One count?

MR. GELLMAN: One count, section 125.25, subdivision 2, of the Penal Law.

THE COURT: What's the situation?

MR. GELLMAN: I have discussed this matter thoroughly with Mr. Cohen, the attorney for Mrs. Harden, and based on our investigations in this case and in the interests of justice, the District Attorney's office is moving to reduce the charge against this defendant to assault in the first degree.

THE COURT: When you say/in ^{it's} the interests of justice, that's based upon the evidence that's available in your possession and you feel in the event it was tried possibly that might be the result of a jury's determination?

MR. GELLMAN: Yes, Your Honor.

THE COURT: You have consulted

the disposition of this case I assume with the law enforcement officials and the police officers who were instrumental in investigating this?

MR. GELLMAN: We have.

THE COURT: And this meets with their approval?

MR. GELLMAN: Yes, it does, Your Honor.

THE COURT: As well as the District Attorney's office?

MR. GELLMAN: Yes.

THE COURT: In view of the statement made by the District Attorney and for the reasons contained therein the Court will accept the recommendation and permit the defendant to plead to the charge of assault in the first degree in violation of section 120.10. Now, Mr. Cohen, the District Attorney has addressed the Court, you represent this defendant, are you indicating to the Court on behalf of your defendant, you are making application to permit the defendant to withdraw the not guilty plea and plead guilty to assault in the first degree?

MR. COHEN: That's correct.

THE COURT: And that section is 120.10, subdivision 3. Delois Harden, you want to stand up. How old are you, Mrs. Harden - is that Miss or Mrs.

THE DEFENDANT: Miss.

THE COURT: How old are you?

THE DEFENDANT: Twenty-five.

THE COURT: Now, you are represented by Mr. Cohen, the lawyer, right?

THE DEFENDANT: Yes.

THE COURT: And you have talked this matter over with Mr. Cohen?

THE DEFENDANT: Yes.

THE COURT: And do you fully understand what's going on here and this change of plea application which has been made by your attorney?

THE DEFENDANT: Yes.

THE COURT: You understand that do you?

THE DEFENDANT: Yes.

THE COURT: And you are doing this voluntarily after full consultation with your attorney?

THE DEFENDANT: Yes.

THE COURT: And is it necessary for you to discuss this with your family or isn't that necessary?

THE DEFENDANT: No, I don't think so.

THE COURT: You think you are old enough and aware of the situation to make a decision yourself after you have conferred with your lawyer, is

that right?

MRS. LORRAINE HARDEN: Judge,
Your Honor, I'm the Mother.

THE COURT: You know what's
going on here don't you?

MRS. LORRAINE HARDEN: Yes.

THE COURT: Now, you understand
that you are waiving your right to a trial by jury by
entering a plea of guilty here, you understand that, do you
not?

THE DEFENDANT: Yes.

THE COURT: And do you also
understand that under your plea of guilty to this charge
that you could receive an indeterminate sentence of up to
15 years, you understand that, don't you, you could?

THE DEFENDANT: Yes.

THE COURT: That's what you are
liable for?

THE DEFENDANT: Yes.

THE COURT: Now, has anybody
made any promises to you of any kind to cause you or induce
you to change your plea in this case or are you doing this
on your own?

THE DEFENDANT: Yes.

THE COURT: Nobody made any
promises to you?

THE DEFENDANT: No.

THE COURT: Now, you have been originally charged with murder, you entered a plea of not guilty to that and you withdraw your former plea of not guilty?

THE DEFENDANT: Yes.

THE COURT: Now, are you pleading guilty now and do you want to plead guilty to assault in the first degree because you are guilty of it and for no other reason?

THE DEFENDANT: Yes, I will plead guilty.

THE COURT: Because you are guilty of it and that's why you are going to do it?

THE DEFENDANT: Yes.

THE COURT: Now, did you between November 24th, 1969 and October 24th, 1971 engage in a course of conduct which included beatings, starvation and other inhuman treatment relating to Michael Harden?

THE DEFENDANT: I'll admit to the beatings but not to the other.

THE COURT: You admit to the beatings which evinced a depraved indifference to human life, right, is that true?

THE DEFENDANT: No.

THE COURT: What are you admitting to? Why are you pleading guilty to assault in the

first degree because you beat the child?

THE DEFENDANT: Yes, because I
have beat him.

THE COURT: And that was during
the period of November 24th, 1969 and October 24th, 1971,
through that period?

THE DEFENDANT: Yes.

THE COURT: Now, how do you
plead to the charge of assault in the first degree, subdivi-
sion 3, in violation of section 120.10, of the Penal Law of
the State of New York, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: All right. You may
be seated. Now, you are the Mother, right? What's your
name?

MRS. LORRAINE HARDEN: My nmae
is Lorraine Harden, Grandma.

THE COURT: Grandma what?

MRS. LORRAINE HARDEN: Grandma
Harden.

THE COURT: What's your first
name?

MRS. LORRAINE HARDEN: Lorraine.

THE COURT: You are the Mother
of--

MRS. LORRAINE HARDEN: Delois

Harden.

THE COURT: And she just pleaded guilty to assault in the first degree. You heard that?

MRS. LORRAINE HARDEN: Yes, I heard it.

THE COURT: You know what's going on here?

MRS. LORRAINE HARDEN: Yes, I know what's going on but she's lying.

THE COURT: And this meets with your approval, right?

MRS. LORRAINE HARDEN: She's lying. I don't say I approve. She's scared of him, she's afraid of him.

THE COURT: I'm not talking about him. You know what happened here today?

MRS. LORRAINE HARDEN: Yes.

THE COURT: Ok, you may sit down. I'm going to adjourn the matter for the imposition of sentence to June 12th. Is that all right, with you, Mr. Cohen?

MR. COHEN: Yes, sir.

THE COURT: This matter is adjourned until June 12th at two o'clock for the purpose of imposing sentence. The defendant is remanded to the custody of the Sheriff.

COUNTY COURT : SULLIVAN COUNTY

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DELOIS HARDEN,

Defendant.
-----X

Present:

HON. BENJAMIN NEWBERG,
Sullivan County Judge.

Appearances:

Hon. Emanuel Gellman, Assistant District Attorney,
appeared for the People.

Hon. Ira Jay Cohen, Public Defender, attorney for
defendant.

The following proceedings were held at the Court
House in the Village of Monticello, Sullivan County, New
York, on the 7th day of August, 1972 at two p.M.

Defendant in Court.

-74-
EXHIBIT "D"

MR. GELLMAN: We move the
imposition of sentence in the case of the People against
Delois Harden.

THE COURT: Take the pedigree.

The Clerk of the Court administered
the oath to the defendant and took her statement.

THE CLERK OF THE COURT: Have you
show
any reason to/why judgment should not be pronounced against
you?

THE DEFENDANT: No.

THE COURT: All right. Mr.
Gellman, do you have anything to say before I pronounce
judgment?

MR. GELLMAN: Yes, I do, Your
Honor. In this particular matter the defendant was
originally charged with murder and then subsequently
pleaded to assault in the first degree, in violation of
section 120.10 of the Penal Law of the State of New York.
Our office has thoroughly investigated this matter and
based on the proof it was our determination that she was
not as guilty of the original crime charged as the co-
defendant was. Subsequently this defendant was very help-
ful to our case, gave us a great deal of information,
testified on the trial as to all aspects of what occurred.
Based on what we have learned, in the interests of justice we
recommend that the defendant receive a sentence, indeter-
minate sentence, of four years.

THE COURT: Mr. Cohen, to you have anything to say before I pronounce judgment?

MR. COHEN: Yes, sir. I want to thank the District Attorney for his comments and pointing out these things to you.

I know Your Honor is fully aware of the facts of this case not only from this case itself but from the companion case which was tried before Your Honor. In addition to those things that Mr. Gellman pointed out in deciding what your sentence will be I think you should also remember that this defendant has no criminal record, this is the first time she had ever been arrested. She in addition to the incident which was involved in this case has two other children which she has raised in a very decent and good manner since birth.

THE COURT: Where are these children now?

MR. COHEN: They are now--

THE COURT: Welfare Department?

MR. COHEN: Yes, they are with foster parents.

THE COURT: They are with whom, foster parents of the Welfare?

MR. COHEN: Department of Welfare.

THE COURT: Welfare supporting them?

MR. COHEN: Yes. But there was evidence and testimony in this case, Your Honor, that anything, any acts of violence which this defendant might have committed against the child in question were at least partially, if not totally, connected with the ^{co-defendant's} duress and force towards this defendant and there is evidence which indicates that that co-defendant also used force against this defendant and it was in that type of attitude and situation that these acts occurred. I ask Your Honor as I am sure you will to keep these things in mind in taking into consideration the imposition of sentence.

THE COURT: Does the defendant desire to say anything before she's sentenced?

MR. COHEN: No.

THE DEFENDANT: No.

THE COURT: Is it Miss or Mrs.?

Miss.

THE DEFENDANT: Miss.

THE COURT: Miss Harden, how old are you?

THE DEFENDANT: Twenty-one.

THE COURT: Now, this defendant stands before this court convicted of the commission of the crime of assault in the first degree. There's been some reference made here to the indictment which originally charged this defendant with the commission of the crime of

murder in concert with one George Foye. Subsequent to the finding of the indictment the defendant entered a plea of guilty to the charge of assault in the first degree and by her plea of guilty stands convicted of that crime.

Now, this Court does not consider the indictment conviction and the Court is not concerned with the type of charge that the defendant was indicted for. The Court is merely concerned with the conviction and the conviction here is assault in the first degree.

And in approaching this case the Court does not find based upon the proceedings heretofore had that this defendant in any way contributed towards the death of her child. She did, then, of course, the charge in this case would not be assault, possibly murder.

The Court is considering that this defendant is a first offender. The Court is also considering that this defendant is a woman of rather weak character, permitted herself to enter into a relationship with a man that resulted in the negligence of her child and finally resulted in the death of one of her children at the hands of the man she was living with and this man has already been sentenced for that crime of murder.

It is important to this Court to know that this defendant has cooperated with the prosecution in the case against George Foye, who was convicted of murder and the Court feels that that is a very important

feature of this case insofar as the imposition of sentence is concerned. And the defendant should be rewarded to some extent for the cooperation that she gave the District Attorney and the fact that she appeared and testified in this case and the Court will consider that in imposing sentence.

It is the sentence of the Court that this defendant receive an indeterminate term, the maximum of which shall be four years and she is committed to the Department of Correction for the purpose of serving that term.

Miss Harden, when you get out of jail, don't get yourself tied up with these people again who are going to cause you to get in trouble again. You do and the next time you are in difficulty it will be a lot more severe. You are receiving some consideration because of your cooperation with the law and if you obey the law you will find you are much better off than breaking it, so your future is entirely up to you.

All right. The defendant is remanded to the custody of the Sheriff.

MR. COHEN: Thank you.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Relator-Petitioner,

-against-

73-CV-547

J. E. LaVALLEE, Superintendent of Clinton
Correctional Facility, Dannemora, New York,

Respondent.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Petitioner was convicted of Class A Felony of Murder of an illegitimate child of the woman he was living with and by whom petitioner had two other children. The infant was four years old at the time of death, and was fathered by another, other than the petitioner. The child was admitted to the hospital and found to be suffering from battered child syndrome that caused death and led to defendant's arrest and to the arrest of the mother, Delois Harden. Both were charged with murder. Petitioner moved for and obtained a separate trial. The mother, Delois Harden, several days before petitioner's trial, pleaded guilty to a lesser charge and she testified at petitioner's trial for the prosecution. Petitioner appealed to the Appellate Division, Third Department, which affirmed without opinion [41 A. D. 2d 902 (1973)]. Leave to appeal to the Court of Appeals

was denied by Judge Breitel. Petitioner has thus shown proper exhaustion of State remedies except possibly as to his last contention which is discussed below. Magistrate Solomon has obtained and furnished to me the bound volume of the Record on Appeal of the Appellate Division, Third Department, Vol. No. 6743 (1973). Such Record contains the appellate briefs also and shall be returned to the Magistrate for return to the State Court. This Court is grateful for this splendid cooperation. The references herein are to the pages of that Record on Appeal.

Petitioner alleges as a main contention in his petition filed in this Court, and prepared by his attorneys who represented him at the State trial and in the appeals, that he was denied due process of law because a State police officer, who made the investigation had made notes of his conversations with petitioner, Miss Harden, and others and had prepared a report which he had filed with the State Police, and that the People's refusal to permit defense counsel to examine the complete report denied him due process of law. Defense counsel was given extracts from the report only to the extent as the Trial Judge ruled that it covered the direct examination of the investigating officer. (R 416-418).

This issue concerns a matter dealing with the admission and production of evidence at the State trial that unless exceptional circumstances are shown cannot form the basis for federal habeas corpus relief. The State Police Investigator testified briefly on direct examination and the Trial Judge had the clear right in his discretion to limit the disclosure of the contents of the broad investigation report for cross-examination purposes. Alleged errors in the

admission of evidence at the trial formed no basis for a collateral attack in federal habeas corpus. The ruling of the Trial Court was in accord with New York Law and the defense had express procedural provisions in that law to move for discovery before trial or to subpoena the report before the cross-examination stage. There is no showing, and I recognize that an examination only would fully inform, that non-disclosure was prejudicial to such extent so as to deprive the petitioner of a fair trial. It is only in such a situation that federal habeas corpus will lie. *Scalf v. Bennett*, 408 F. 2d 325, 330 (8th Cir. 1969). There is no proof evident in this record to suggest deliberate misconduct on the part of the prosecutor for intentional concealment of facts that would be favorable to the defense. Evidence in disclosure must be vital and material to furnish grounds for reversal of a conviction. *Clarke v. Burke*, 440 F. 2d 853 (7th Cir. 1971), cert. den., 404 U.S. 1039 (1972). From my review of the pertinent parts of the record and reading of the State appellate briefs on this point, there is no support for the contention that evidence favorable to the defense was improperly withheld in violation of a constitutional right. See *People v. Rosario*, 9 N.Y. 2d 286 (1961); *United States v. Bonanno*, 430 F. 2d 1060, 1063 (2d Cir. 1970), cert. den., 400 U.S. 964 (1970); *United States v. Miller*, 411 F. 2d 825, 832 (2d Cir. 1969). *Jencks v. United States*, 353 U.S. 657 at 672 (1957), is a federal ruling governing production of relevant statements and reports of government witnesses touching the subject matter of their testimony given at the trial. If this ruling is applicable in this State context, there would appear in my judgment to be no violation by the limitation here of disclosure of the investigator's report. See 18 U.S.C. 3500.

Petitioner further claims violation of due process of law in that the bulk of the incriminating testimony against him was elicited from Delois Harden and such testimony consisted of instances of isolated assaults by petitioner not sufficient to sustain conviction for murder. Such contention amounts to an assertion of insufficient evidence in a State court trial which is not reviewable by habeas corpus. *Freeman v. Stone*, 444 F. 2d 113 (9th Cir. 1971).

Petitioner further contends that after Delois Harden had testified against him, she was cross-examined in regard to the entry of her plea of guilty. Petitioner claims his counsel was not permitted to find out in what manner Miss Harden was persuaded to come to court to testify against him. Such error, if there were any, relates to a collateral matter not sufficient to warrant habeas corpus. Evidentiary mistrials of this kind to rise to a constitutional plane must be material in the sense of being a highly significant factor. *Lawrence v. Wainwright*, 445 F. 2d 281, 282 (5th Cir. 1971). If this line of questioning constituted an error, it related to questions of credibility which are not a proper ground to raise by federal habeas corpus. *U.S. ex rel. Morton v. Mancusi*, 393 F. 2d 482 (1968), cert. den., 393 U.S. 927 (1968).

The contention that Delois Harden's evidence was vague and unresponsive is not a sufficient basis for habeas corpus relief inasmuch as the record discloses testimony of particular instances of beatings by other witnesses. P. 3, Brief for Respondent; see *U.S. ex rel. Griffin v. Martin*, 409 F. 2d 1300, 1302 (2 Cir. 1969).

Petitioner claims that the prosecutor had an obligation to apprise the court and jury of the nature of the promise of leniency which was given Delois Harden to reward for her testimony. In the cross-examination of Miss Harden, defense counsel asked questions relating to her plea of guilty. The record does not indicate defense counsel was prevented from asking further questions in regard to any prosecution promise of leniency and the cross-examination of Delois Harden was very extensive. (R 102-201). Delois Harden, a major prosecution witness, pleaded guilty to assault in the first degree before the trial and the prosecutor recommended a four-year indeterminate sentence to the court after the petitioner's trial.

Petitioner claims that Miss Harden's statements as to the reduction of the charge against her were untrue and the prosecutor had the burden of bringing out the true facts and circumstances. I have examined petitioner's brief and supplemental brief to the Appellate Division, Third Department, in the Record on Appeal and it does not seem that this point was brought directly to the attention of the New York courts. It may be that petitioner has failed to exhaust his State court remedies in this respect, and there is question whether it can be used as a basis for federal habeas corpus. However, it is similar to other claims and considering it on the merits, it is my judgment that from the record it has no federal substance. See U.S. ex rel. Levy v. McMann, 394 F. 2d 402, 404 (2 Cir. 1968). The petition for which the filing fee has been paid is denied and dismissed.

It is so Ordered.

Dated: January 4, 1974
Albany, New York

§/ HON. JAMES T. FOLEY
UNITED STATES DISTRICT JUDGE

THE NEW YORK
PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
100 N. 4TH ST. NEW YORK 17, N.Y.